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**VIA COURIER**

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, DC 20554

Re: GTE-Bell Atlantic Merger, CC Docket No. 98-184

Dear Ms. Salas:

Please place the attached letter to Thomas Krattenmaker in the public record for the above-referenced proceeding.

For your convenience, an original and 12 copies of this filing are enclosed. Please date stamp the enclosed extra copy of this filing and return it in the attached self-addressed envelope.

Thank you for your attention to this matter. If you have any questions, please do not hesitate to call me.

Sincerely,

Andrew D. Lipman
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April 2, 1999



**VIA COURIER**

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Re: CC Docket No. 98-184 - GTE-Bell Atlantic Merger

Dear Mr. Krattenmaker:

Level 3 Communications, Inc. ("Level 3"), by its undersigned counsel, wishes to respond briefly to the *ex parte* letter filed by GTE and Bell Atlantic ("GTE/BA") on February 24, 1999, requesting "limited interim relief" in connection with GTE's provision of long distance services in Bell Atlantic's in-region states (the "Request").

## Introduction

Level 3 respectfully submits that the so-called "limited interim relief" sought by GTE/BA is, in reality, a sweeping exemption from Section 271 of the Communications Act that is beyond the Commission's power to grant. Further, the exemption sought by these companies would not be in the public interest even if it were legally possible for the Commission to consider their Request. Other parties are addressing the legal infirmities of the Request in detail,[1] and Level 3 therefore will limit this letter to a discussion of the public interest considerations.

The Request seeks two exemptions from the provisions of Section 271 prohibiting GTE, as a post-merger affiliate of a Bell operating company, from providing interLATA services in Bell Atlantic's in-region states. First, with respect to interLATA voice services, the companies ask for authority to continue serving GTE's existing in-region customers for 90 days following approval of the merger, purportedly to avoid "disruption" to these customers. Second, the companies ask that

[1] Sprint Communications Co., *Petition to Process Bell Atlantic-GTE Request for Relief as a Major Amendment to Application for Issuance of Further Public Notice* (filed in CC Docket No. 98-184, March 12, 1999); AT&T Corp., *Motion for Public Notice* (filed in CC Docket No. 98-184, March 16, 1999); *ex parte* letter from RCN Telecom Services, Inc. to Thomas Krattenmaker, CC Docket No. 98-184 (March 17, 1999).

GTE be permitted to continue providing Internet backbone services throughout Bell Atlantic's region as soon as Bell Atlantic has achieved Section 271 approvals for states covering at least 25% of its access lines.

### 1. The Commission Must Not Undermine the InterLATA Prohibition

As an initial matter, the Commission has been quite properly wary of any efforts to circumvent the broad interLATA prohibition in Section 271, because this provision is fundamental to the system of regulatory incentives established in the 1996 Act. Congress had good reasons for requiring Bell operating companies to meet stringent conditions before entering any interLATA markets. It imposed these conditions to prevent the BOCs from using their effective monopoly in one market, the local loop, to impede competition in other markets where their competitors need access to the loop. Any public interest analysis must, therefore, weigh the alleged benefits of the relief sought by GTE/BA against the harm to the public interest resulting from evasion of the Section 271 safeguards.

### 2. GTE/BA's "Public Interest" Arguments Do Not Hold Water

In a tone that suggests they are engaging in the Internet backbone business not to make a profit but solely as a public service, GTE/BA claim that allowing them to provide in-region interLATA services over GTE's backbone would "produce enormous public interest benefits." (Request at 4.) They claim that the Internet backbone is on the verge of being dominated by the three largest long distance carriers, and that "GTE Internetworking ... is the *only* remaining Internet backbone provider that stands in the way of the Big Three's acquisition of oligopoly control over the Internet." (*Id.* at 5, emphasis added.)

This argument must have a familiar ring to the Commission, because it is strongly reminiscent of arguments all the Bell companies have been making for over a decade in support of interLATA relief. The Bell companies have insisted for years that three large carriers are establishing an oligopoly over the interexchange market, and that the introduction of new, powerful entrants (*i.e.*, the Bell companies) is absolutely necessary to reinvigorate competition in this market. The BOCs have argued that they must be allowed to ride to the rescue of the American consumer, who would otherwise be helpless before the price-fixing power of the Big Three. This is their story, and they have been sticking to it, even as long distance rates have fallen, demand has skyrocketed,[2] and a wide variety of innovative new services have been introduced. Attracted by the economic potential of these new markets, investors have provided billions in new capital to Level 3 and other entrants such as Qwest, IXC Communications, Williams Communications, Frontier, and others who are building new long-distance facilities at an unprecedented pace.

Now GTE/BA are freshening up this tired old argument by applying it to the Internet backbone instead of "plain old" long distance service. Indeed, Bell Atlantic has been pursuing this line of attack, unpersuasively, since last year. In January, 1998, it filed a Petition with the

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[2] Average revenue per minute of long-distance carriers fell by about one-third between 1992 and 1997, while minutes of use grew by over 40 percent over the same period. FCC Industry Analysis Division, *Trends in Telephone Service* (July 1998).

Commission seeking "relief" under Section 706 of the Telecommunications Act of 1996,[3] to permit it (among other things) to own and operate an interLATA Internet backbone in its region.[4] It claimed that the Internet backbone is becoming increasingly congested, and that the free market cannot solve this problem because of consolidation among backbone providers.[5] Only Bell Atlantic, it suggested, could bring increased backbone capacity to users throughout its in-region states.[6] The Commission, however, has squarely rejected Bell Atlantic's repeated pleas for exceptions, modifications, waivers, and other evasions of the interLATA restriction for Internet-related services.[7]

Interestingly, GTE (in its pre-merger agreement manifestation) was one of several Internet backbone providers to refute Bell Atlantic's argument. GTE responded as follows:

> [Bell Atlantic] would have the Commission believe that without their participation in the backbone data networks, there would be no innovation, improvements or advanced technologies deployed. GTE rejects Bell Atlantic's suggestions that existing backbone providers provide inadequate service and focus only on business customers. Bell Atlantic further opines that this situation will not improve until the Commission grants the forbearance sought by Bell Atlantic. Obviously, the network had developed without the RBOCs and will continue to develop and improve.
>
> . . . .
>
> RBOC talents and resources are indeed substantial and make them formidable competitors. However, it is flat wrong to imply that all providers of backbone services are hunkered down in a defensive posture. GTE has invested more [than] one-half billion dollars to support its commitment to be an intense and effective competitor.[8]

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[3] Pub. L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157.

[4] *Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services*, CC Docket No. 98-11 (filed Jan. 26, 1998).

[5] *Id.* at 12-15.

[6] *Id.* at 15-17. Bell Atlantic has continued to press for interLATA relief for Internet backbone services in the intervening months. *See Emergency Petition of Bell Atlantic-West Virginia for Authorization to End West Virginia's Bandwidth Crisis*, File No. NSD-L-98-99, Public Notice, DA 98-1506 (released July 28, 1998); *ex parte* letter from Edward D. Young III to Lawrence Strickling, filed in CC Docket No. 98-147, January 11, 1999. Although the January 11 letter makes no reference to GTE, its rhetoric is otherwise strikingly similar to that of the GTE/BA Request, including its request for "limited" interLATA relief.

[7] *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147 *et al.*, Memorandum Opinion and Order, FCC 98-188, ¶¶ 12, 69-79, 80-82 (released Aug. 7, 1998).

[8] Comments of GTE, *Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services*, CC Docket No. 98-11 *et al.*, at 9 (filed April 6, 1998).

Level 3 and other carriers who were even then in the midst of deploying new backbone capacity responded similarly.[9]

Now that GTE is ready to merge with Bell Atlantic, it suddenly sees the merits of the "indispensable entrant" argument. Although last year it believed that network innovation and deployment would continue just fine without RBOC participation, now it is convinced that *only* GTE Internetworking can prevent the domination of the Internet backbone by the long-distance "oligopoly." Thus, GTE/BA now argue that

> it is essential that the [merged] company be able to operate [GTE] Internetworking's existing Internet backbone and related businesses that feed traffic onto it without interruption. Indeed, without limited relief to keep Internetworking functioning as a national whole, the market for Internet backbone service will suffer serious competitive injury.
>
> . . . .
>
> [T]he state of Internet backbone competition remains precarious. . . . Internetworking, with a small 6 percent share of the backbone business, is the only remaining Internet backbone provider that stands in the way of the Big Three's acquisition of oligopoly control over the Internet.[10]

This latest GTE/BA argument suffers the same flaws as the earlier Bell Atlantic argument that GTE criticized in CC Docket No. 98-11, and the even older RBOC arguments about "oligopoly" in the long-distance market. The companies wrongly assert that they are the only ones capable of overcoming barriers to entry in the Internet backbone, when in fact those barriers are relatively modest and are being challenged by Level 3 as well as various other entrants. In fact, the barriers to entry in the Internet backbone are *essentially the same* as those in the traditional interexchange market, because Internet backbone service consists largely of the provision of dedicated, high capacity, point-to-point circuits between and among Internet points of presence.[11] As already noted,

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[9] Comments of Level 3, *Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services*, CC Docket No. 98-11 *et al.*, at 9 (filed April 6, 1998).

[10] GTE/BA Request at 5.

[11] GTE/BA argue that Internet backbone services are "on the periphery" of the long distance restriction, and that Congress did not have such advanced services in mind when enacting Section 271. (GTE/BA Request at 6-7.) This is wrong as a factual matter – Internet protocol services are the networks of the future, and will have far more impact on the future competitive market structure of the telecommunications industry than will the traditional voice networks. As a legal matter, in any event, the Commission has made it clear that Section 271 applies to all interLATA services, even non-regulated information services that have a bundled interLATA transmission component. *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended,* CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking (rel. Dec. 24, 1996), ¶ 55 ("'interLATA service' encompasses ... interLATA information service"), ¶ 56 ("interLATA information services are provided via interLATA telecommunications transmissions and, accordingly, fall within the definition of 'interLATA service.'"). Further, Congress provided explicitly in Section 271(h) that the "incidental" exceptions to the interLATA prohibition are to be construed narrowly, contradicting GTE/BA's assumption that Congress had only

Level 3 is just one of several carriers who are, even now, constructing massive amounts of new Nation-wide and World-wide transmission capacity that can be used, among other things, to provide Internet backbone links.[12]

GTE/BA further argue that their backbone is indispensable to the survival of competition based on the "peering" structure of the Internet. They describe the issue as follows:

> Today, major backbone providers exchange traffic through peering arrangements. These arrangements only work so long as the interconnecting backbones exchange roughly comparable traffic volumes and maintain mutual incentives to interconnect. If [GTE] were to fall significantly behind the other major backbone providers, those mutual incentives would break down and [GTE] would become dependent on the larger backbones, which could refuse to continue the existing peering arrangements and dictate unfavorable interconnection terms.
>
> . . . .
>
> . . . Because the value of each network backbone increases as the number of customers on the network increases, upsetting the delicate balance that exists today between major providers would tip the scales unalterably in favor of the Big Three. As their networks continue to grow relative to other providers, more and more customers will be pushed to those networks, creating a snowball effect that leads to still further concentration.[13]

The issue of Internet structure raised by GTE/BA is indeed a serious concern, but it is one that affects all current and prospective providers of backbone transmission services. GTE/BA suggest that the Internet backbone market is structured in a way that creates incentives for incumbent providers with large market shares to discriminate against smaller providers (including new entrants) in the terms and conditions of network interconnection. Level 3 shares this concern, and believes that the possibility of exclusionary behavior by incumbent backbone providers merits investigation.[14]

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"traditional" long distance in mind. To the contrary, it seems clear that Congress anticipated and intended to prevent attempts like this to make the exceptions to the interLATA prohibition swallow the rule.

[12] Also, GTE/BA dismiss Cable & Wireless, the *largest* of the backbone providers, with a wave of the hand based on a single newsletter article suggesting that the company is having trouble digesting the Internet business it acquired from MCI last year. It is unrealistic to expect that the C&W backbone business is simply going to disintegrate, or that the company will be permanently unable to remedy whatever transition problems it may have experienced. Even if C&W were unable to turn its business around, its Internet backbone facilities and customer base would be an asset that could readily be transferred to another new provider (even to BA/GTE once all required Section 271 approvals were in place).

[13] Request at 6.

[14] Indeed, the FCC has expressed its concern "about the interconnection difficulties that . . . Level 3 has articulate[d] . . . [and] conclude[d] that peering is likely to remain an issue that warrants monitoring." *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, Memorandum Opinion and Order, ¶ 155 (rel. Sept. 14, 1998).

However, a waiver of Section 271 for one company is not going to cure whatever competitive defects exist in the Internet backbone market.

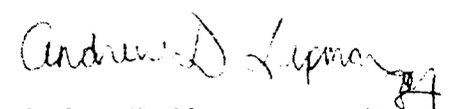
GTE/BA propose, in effect, that the Commission name GTE as the "designated competitor" in the Internet backbone market, and allow GTE to use whatever strength it has based on its existing six percent market share to offset the combined market power of all of the larger backbone providers. Merely stating this proposition demonstrates its absurdity. If the backbone market is inherently structured in an anti-competitive manner, then preserving GTE's position in that market will simply enable it to benefit from its position in the same manner as the few other incumbents. These benefits will flow to GTE, not to customers. Further, even if the Commission were willing to entertain this proposal (which it should not), it would be absurd to do so without at least imposing a condition requiring GTE Internetworking to offer interconnection to its backbone on reasonable, non-discriminatory terms, and to make those terms available for public inspection, thereby ensuring at least that GTE will not aggravate the very problem about which it complains.

If the Commission wants to prevent the abuse of market power by Internet backbone providers, it needs to explore a solution that addresses the structure of that market and the relationships among all networks, not look for a short-term fix that will benefit one company exclusively. This merger investigation, of course, is not the appropriate proceeding in which to address industry-wide peering issues, and Level 3 intends to raise this issue in other venues.

## Conclusion

As explained in the Introduction to this submission, Level 3 has not repeated herein the legal analysis offered by other parties, but agrees with those who have demonstrated that the Commission lacks legal authority to grant the GTE/BA request for "limited interim relief," and therefore should summarily dismiss that request. Even if that were not the case, Level 3 submits for the reasons discussed above that interLATA relief would not promote the public interest. GTE/BA's claim that GTE is the only company capable of preserving competition in the Internet backbone market ignores the presence of Level 3 and several other potential competitors; and, in any case, it would be inherently bad policy to rely solely on one company to prevent oligopoly in a particular market. Accordingly, GTE/BA's Request should be denied.

Respectfully submitted,



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cc: Service List
Bill Hunt, Esq.

## CERTIFICATE OF SERVICE

I, Wendy Stanley, hereby certify that on this 2nd day of April, 1999, I served a copy of the foregoing letter to Thomas Krattenmaker, CC Docket No. 98-184, on the following parties listed below via hand delivery or via first class postage-paid U.S. mail*:

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